10-10-2013

Sims v. Jacobsen Respondent's Brief Dckt. 40474

IN THE SUPREME COURT OF THE STATE OF IDAHO

KEITH A. SIMS, dba KASCO OF IDAHO, LLC, an Idaho limited liability company,

Plaintiff/Appellant

v.

DAN S. JACOBSON, an individual; SAGE HOLDINGS, LLC, an Idaho limited liability company; STEVEN G. LAZAR, an individual; THE MITCHELL A. MARTIN AND KAREN C. MARTIN FAMILY TRUST DATED AUGUST 9, 2005; and DEVON CHAPMAN, an individual,

Defendants/Respondents

Supreme Court No. 40474-2012

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County.

Honorable Benjamin R. Simpson, District Judge, Presiding.

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A. Nature of Case

Appellant initiated this action by which it sought to judicially foreclose three separate mechanic's liens in accordance with Idaho Code § 45-501, *et seq*. After commencement, this action was consolidated with another mechanic's lien foreclosure action commenced by ACI Northwest, Inc. which involved the same real property located in Post Falls, Idaho.

B. Course of Proceedings

On December 16, 2010, the Respondents, Dan S. Jacobson, Sage Holdings, LLC, Steven G. Lazar, The Mitchell A. Martin and Karen C. Martin Family Trust dated August 9, 2005, and Devon Chapman (hereinafter collectively "Respondents"), filed *Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC.* (Aug. R.). A hearing was held on Respondents' Motion on January 18, 2011, at which time the trial court orally granted the Defendants' Motion. (Tr. p. 26, ls. 8-9). Following the hearing, the court issued an *Order Granting Defendants' Second Motion for Summary Judgment Against Kasco of Idaho,* LLC. (Aug. R.). That same day, the court issued a *Partial Summary Judgment Against Kasco of Idaho, LLC*, thereby establishing that each of Appellant's three claims of lien were lost and unenforceable against Respondents' interest in the real property encumbered thereby. (Aug. R.).

On January 24, 2011, Respondents submitted their *Defendants' Third Motion for Summary Judgment Against Kasco of Idaho, LLC.* (Aug. R.). A hearing was held on Respondents' Motion on February 22, 2011, at which time the trial court orally granted the Motion. (Tr. p. 47, ls. 15-25). Following the hearing, the court issued an *Order Granting Defendants' Third Motion for Summary Judgment Against Kasco of Idaho, LLC* and a *Partial Summary Judgment Against Kasco of Idaho, LLC*, both of which were entered on March 8, 2011. (Aug. R.). Pursuant to the Judgment, the trial court dismissed Appellant's third cause of action, identified as "Quantum Merit" [sic], against the Respondents, with prejudice. *Id.*

On September 30, 2011, Appellant filed an appeal in this action. (Supreme Court Docket No. 39244-2011). By order dated February 27, 2012, this Court ultimately dismissed that appeal on the basis that it was untimely.

Following remittur, the trial court entered a Rule 54(b) Certificate as to Appellant's claims against the Respondents. (R. at 36-38). Afterwards, the Respondents' sought an award of their fees, costs and sanctions against Appellant. (Aug. R., *Motion for Costs, Attorney's Fees and Sanctions*). A hearing on Respondents' Motion was held on November 19, 2012, at which time the trial court concluded Respondents were entitled to an award of their fees pursuant to Idaho Code §§ 12-120(3) and 12-123. (Aug. R., *Order Approving Costs and Attorney's Fees*). In addition, the trial court concluded that the Respondents were entitled to an award of their costs pursuant to Rule 54(d), I.R.C.P. *Id.* On November 27, 2012, a *Judgment* was entered against Appellant on behalf of the Respondents for the total amount of $33,914.25. (R. at 49-50).

Appellant filed this appeal on October 30, 2012. (R. at 39-43). Thereafter, Appellant filed an *Amended Notice of Appeal* on December 7, 2012. (R. at 51-56).

C. Statement of Facts

Respondents direct this Court to the following statement of facts to the extent those cited by Appellant are incomplete and/or fail to contain proper citations to the transcript and record of the proceedings below:

1. On or about June 20, 2008, Monument Heights, LLC allegedly contracted Appellant to provide certain labor, materials and services in the improvement of three contiguous parcels of real property located in Post Falls, Idaho, each of which are approximately 20 acres in size. (39244-2011 R., Vol. 2, p. 273, ¶ 1.15).

2. On June 20, 2008, Appellant allegedly commenced furnishing labor, materials and services in the improvement of real property owned by Monument Heights, LLC, located in Post Falls, Idaho. (39244-2011 R., Vol. 2, p. 273, ¶ 1.15). As of September 13, 2008, Appellant had ceased providing labor, materials and services. *Id.*

3. On August 1, 2008, Monument Heights, LLC executed and delivered to the Respondents a *Deed of Trust* conveying certain real property in Kootenai County, Idaho, to a trustee as security for payment of an indebtedness owed to the Respondents. (Aug. R., *Affidavit of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 1.); (39244-2011 R. at 275, ¶ 2.7). The Deed of Trust was

subsequently recorded with the Kootenai County Recorder on August 6, 2008 as Instrument 2172582000. *Id.*

4. On November 25, 2008, Appellant caused three mechanics liens to be recorded with the Kootenai County Recorder. (39244-2011 R., Vol. 2, p. 274, ¶ 2.2). The liens, each entitled "Claim of Lien", were recorded as Instrument Nos. 2187173000, 2187174000 and 2187175000. In confused and illogical fashion, the liens encumber four (4) parcels of real property, three of which are owned by Monument Heights, LLC and are identified in Respondents' Deed of Trust. (39244-2011 R., Vol. 2, p. 285-294)[1].

5. On May 11, 2009, Appellant commenced this action to judicially foreclose its three mechanic's liens. (39244-2011 R., Vol. 1, p.148-72). In its initial pleading, Appellant simply named *Monument Heights, LLC* and *John and Jane Doe 1-100, Owners*, as the Defendants. *Id.*

6. On December 18, 2009, the Appellant filed an amended pleading. (39244-2011 R., Vol. 1, p. 185-193). By its amended pleading, Appellant joined Respondents (Dan S. Jacobson, Sage Holdings, LLC, Steven G. Lazar, The Mitchell A. Martin and Karen C. Martin Family Trust Dated August 9, 2005, and Devon Chapman) as Defendants to this action. *Id.*

7. Appellant's pleading recited three causes of action against the class of defendants generally: (1) foreclosure of materialman's lien; (2) breach of contract; and (3) quantum merit [sic]. *Id.*

8. With respect to the breach of contract claim, Appellant alleged

> 3.1 A valid contract between the owners . . . and all DEFENDANTS individually, as owners for KASCO to provide labor, materials, and services relating to the subject property.
> 3.2 KASCO performed its obligations under the contract with DEFENDANTS individually and as owners, and/or agents for owners.

[1] It is unknown why Appellant filed three separate claims of lien. For instance, Instrument No. 2187173000 encumbers the three (3) parcels property owned by Monument Heights, LLC, in addition to a 20 acre parcel abutting the property to the north east which is owned by parties who have yet to be named or joined to this action by Appellant. Instrument No. 2187174000 on the other hand, encumbers the 20 acre parcel which lies due east of the other two parcels owned by Monument Heights. Finally, Instrument No. 2187175000 encumbers the two 20 acre parcels which are located due west of the parcel encumbered by Instrument 2187174000. Simply put, each of the parcels described in Instrument Nos. 2187174000 and 218717500 are described in Instrument 2187173000.

3.3 DEFENDANTS individually, as owners, and or as agents for owners breached the contract by failing to pay KASCO the amount for its labor, materials and or services in the sum of $140,378.00 plus interest at the highest lawful rate.
3.4 This contract was a commercial transaction such that KASCO is entitled to attorney fees as previously alleged and pursuant to Idaho Code Sections 12-120(3) and also under 12-120.

(39244-2011 R., Vol. 1., p. 190, ¶¶ 3.1-3.4). Appellant's *Fifth Amended Verified Complaint* filed on December 15, 2010, incorporated this same language. (39244-2011 R. Vol. 2, p. 276, ¶¶ 3.1-3.4) (emphasis added).

9. With respect to Appellant's quantum merit [sic] claim, it alleged:

4.1 DEFENDANTS individually, as owners, and/or as agents for owners accepted the labor, materials and services of KASCO.
4.2 The reasonable value of said labor, materials, and services is $140,378.00
4.3 DEFENDANTS individual, as owners, and/or agents of owners have failed to pay for the reasonable value of the labor, materials, and services in said sum.
4.4 That if DEFENDANTS individually, as owners, and/or agents of owners are not required to reimburse KASCO for said labor, materials, and or services, DEFENDANTS will be unjustly enriched by the value set forth above.
4.5 KASCO does hereby request a trial by jury.

(39244-2011 R., Vol. 1., p. 190-91, ¶¶ 4.1-4.5). Again, Appellant's *Fifth Amended Verified Complaint* filed on December 15, 2010, incorporated this same language. (39244-2011 R., Vol 2, p. 276-277, ¶ 4.1-4.5).

10. On October 15, 2010, Appellant filed its *Fifth Amended Verified Complaint.* (39244-2011 R., Vol. 2, p. 270-297).

11. On December 15, 2010, Appellant agreed to dismiss its breach of contract claim against Respondents.

12. On December 8, 2010, Respondents propounded a set of discovery requests upon Appellant. (Aug R., *Affidavit of Jonathon D. Hallin in Support of Defendants' Third Motion for Summary Judgment Against Kasco of Idaho, LLC, Ex. A.*). In response, Appellant averred under oath as follows:

REQUEST FOR ADMISSION NO. 4: Please admit that you do not currently have a contractual relationship with Defendants Jacobson.

RESPONSE TO REQUEST FOR ADMISSION NO. 4: Plaintiff doesn't have enough information to either admit or deny and therefore Plaintiff denies the same on the basis that KASCO entered into a blasting contract but does not know the specific relationship between MONUMENT HEIGHTS and JACOBSON. The parties could have an agency relationship.

REQUEST FOR ADMISSION NO. 5: Please admit that you have never had a contractual relationship with Defendants Jacobson.

RESPONSE TO REQUEST FOR ADMISSION NO. 5: KASCO cannot admit or deny and therefore denies the same pursuant to its answer to Request for Admission No. 4.

REQUEST FOR ADMISSION NO. 6: Plaintiff does not have enough information to either admit or deny and therefore denies the same for the reason as stated in its answer to Request for Admission No. 4.

REQUEST FOR ADMISSION NO. 7: Please admit that you have never had any direct communication with Defendants Jacobson concerning the work that you performed on the Subject Property.

RESPONSE TO REQUEST FOR ADMISSION NO. 7: If direct communication is defined as face-to-face colloquy with DAN S. JACOBSON, STEVEN G. LAZAR and DEVON CHAPMAN, then KASCO does not believe it has had conversations with said persons but cannot say that is employees have not had direct communications with said Defendants. With regard to SAGE HOLDINGS and THE MITCHELL A. MARTIN AND KARCEN [sic] C. MARTIN FAMILY TRUST, individuals have not been identified with regard to those individuals and therefore KASCO does not have enough information to either admit or deny and therefore denies the same.

REQUEST FOR ADMISSION NO. 8: Please admit that the Defendants Jacobson had no authority to control the scope of the work that you performed on the Subject Property.

RESPONSE TO REQUEST FOR ADMISSION NO. 8: KASCO does not have enough information to admit or deny and therefore denies the same base upon the foregoing answer to requests for admission.

REQUEST FOR ADMISSION NO. 9: Please admit that the Defendants Jacobson did not control, manage, or direct the work that you performed on the Subject Property.

RESPONSE TO REQUEST FOR ADMISSION NO. 9: KASCO cannot admit or deny the Request for Admission and therefore denies the same based on the foregoing answers to Requests for Admission.

REQUEST FOR ADMISSION NO. 10: Please admit that the Defendants Jacobson did not supervise the work that you performed on the Subject Property.
RESPONSE TO REQUEST FOR ADMISSION NO. 10: KASCO cannot admit or deny this Request for Admission and therefore denies the same based upon the foregoing Answers to Requests for Admission.

(Aug R., *Affidavit of Jonathon D. Hallin in Support of Defendants' Third Motion for Summary Judgment Against Kasco of Idaho, LLC, Ex. B.*).

II. STANDARD OF REVIEW

"When reviewing a grant of summary judgment, this Court applies the same standard of review used by the district court in ruling on the motion." *Grazer v. Jones*, 154 Idaho 58, 294 P.3d 184, 190 (2013); citing *Sec. Fin. Fund, LLC v. Thomason,* 153 Idaho 343, 346 (2012). Summary judgment is proper if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c). When a summary judgment motion has been supported by depositions, affidavits, or other evidence, the adverse party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing the motion. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87 (1986).

The party seeking summary judgment bears the initial burden to show that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554 (Ct. App. 2005). "When the party moving for summary judgment will not carry the burden of production or proof at trial, the 'genuine issue of material fact' burden may be met by establishing the absence of evidence on an

element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311 (Ct. App. 1994). Once such an absence of evidence has been demonstrated, the burden shifts to the party opposing the motion to show through further depositions, discovery responses, or affidavits that there is indeed a genuine issue for trial or to show a valid justification for its failure to do so under I.R.C.P. 56(f). *Id.*

When a court considers a motion for summary judgment, all facts are to be liberally construed in favor of the nonmoving party, and the court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517 (1991). "However, where an action will be tried before the court without a jury 'the trial judge is not constrained to draw inferences in favor of the non-moving party, but rather the judge is free to arrive at the most probable inferences to be drawn from the uncontroverted evidentiary facts, despite the possibility of conflicting inferences.'" *Quemada v. Arizmendez*, 153 Idaho 609, 613 (2012).

"The decision to grant or deny a Rule 56(f) continuance is within the sound discretion of the trial court." *Boise Mode, LLC v. Donahoe Pace & Partners Ltd*, 154 Idaho 99, 294 P.3d 1111, 1115 (2013); citing *Taylor v. AIA Services Corp.*, 151 Idaho 552, 572 (2011). In reviewing a discretionary decision, the proper inquiry is "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 94 (1991).

"An award of attorney fees is within the discretion of the trial court and subject to review for an abuse of discretion.'" *Total Success Investments, LLC v. Ada County Highway Dist.*, 148 Idaho 688, 694 (Ct. App. 2010); citing *Taylor v. Maile,* 146 Idaho 705, 712 (2009). Likewise, calculation of reasonable fees is reviewed under an abuse of discretion standard. *Partout v. Harper*, 145 Idaho 683, 690 (2008). "'Whether the district court has correctly determined that a case is based on a 'commercial transaction' for the purpose of I.C. § 12-120(3) is a question of

law' over which this Court exercises free review." *Carillo v. Boise Tire Co.*, Inc., 152 Idaho 741, 755 (2012).

III. ADDITIONAL ISSUES ON APPEAL

E. Whether Respondents are Entitled to an Award of their Fees and Costs Incurred Defending this Appeal Pursuant to I.A.R. 11.2, 40 and 41, and I.C. §§ 12-120(3) and 12-121.

IV. ARGUMENT

A. Appellant has Failed to Demonstrate Why its Lien was not Rendered Lost and Unenforceable Due to its Failure to Timely Join the Respondents Within Six Months.

In poor and disjointed fashion, Appellant challenges the district court's decision granting Respondents' second motion for summary judgment. Due to the incoherent manner in which Appellant presents this issue, it is hard to distil its arguments into a presentable format, much less respond in a logical manner. That being said, Appellant's argument appears to be dual-faceted. First, Appellant suggests its failure to timely comply with I.C. § 45-510 stems from the fact that it was without notice as to Respondents' interest in the subject property. Next, Respondent suggests, without much more, that I.R.C.P. 17(d) somehow operated to toll operation of I.C. § 45-510.

1. Idaho's Appellate Courts have Consistently Held that I.C. § 45-510 Renders a Lien Lost and Unenforceable Against those Subordinate Interests not Timely Joined.

In Idaho, the right to file mechanic's liens exists solely as a result of statutory enactment. *Great Plains Equip., Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 760 (1999). "The provisions of I.C. § 45-501 are to be liberally construed in the favor of the persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building or structure." *L & W Supply Corp. v. Chartrand Family Trust*, 136 Idaho 738, 742-43 (2002);

citing *Great Plains Equip., Inc.,* 132 Idaho at 760. "This rule, however, 'does not permit the court to create a lien where none exists or was intended by the legislature.'" *Id.*, at 743; citing *Great Plains Equip., Inc.,* 132 Idaho at 761. "Therefore, while 'this section will be liberally construed,' 'the statutory requirements must be substantially complied with in order to perfect a valid mechanic's lien." *Id.*; citing *Pierson v. Sewell*, 97 Idaho 38, 41 (1975).

"Idaho Code § 45-510 provides a court with jurisdiction to enforce a lien when a lien is filed and an action commenced within six months." *Parkwest Homes, LLC v. Branson*, 154 Idaho 678, 302 P.3d 18, 24 (2013). Specifically, that statute provides:

> No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or unless a payment on account is made, . . . , and such payment or credit and expiration date, is indorsed on the record of the lien, then six (6) months after the date of such payment or expiration of extension.

I.C. § 45-510. "The Idaho statute does not, in terms, prescribe who shall be made parties to the action thereby required to be brought; but we agree with the learned judge of the court below that it necessarily means that it must be brought against all of those whose rights, estates, or interests are claimed to be adverse and subordinate; otherwise they could not be concluded." *Cont'l & Commercial Trust & Sav. Bank v. Pac. Coast Pipe Co.*, 222 F. 781, 788 (9th Cir. 1915).

"However, even if an action is brought to enforce a lien within a six month period, it is lost against the interests of persons not named." *Parkwest Homes, LLC*, 302 P.3d at 24; accord 56 C.J.S. Mechanics' Liens § 392 ("An action which does not include all necessary parties does not stop the running of the statute as to the omitted parties."); see also *Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 185 P. 554, 555 (1919) ("Of consequence, a mechanic's lien is lost and unenforceable against the interest of a junior lienholder not made a party to an action to foreclose the lien within the six month period."). "Thus, in a foreclosure action, the action (1) must be timely brought under statute; and (2) must timely name the proper interested parties." *Id.*

"This holding encourages judicial efficiency and finality of litigation by mandating the joinder of all interests and competing claims in a lien foreclosure action." *Bonner Building Supply, Inc. v. Std. Forest Products, Inc.*, 106 Idaho 682, 686 (Ct. App. 1984) (emphasis added). "The limitation prescribed by statute of the time within which an action must be brought in a proper court for the foreclosure of a mechanic's lien is not the ordinary statute of limitation, which is waived, if not pleaded." *Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 185 P. 554, 555 (1919). "The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone." *Id.*; accord *Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 403 (2010). "It is a condition attached to the right to sue at all." *Id.*

2. There is no Dispute the Appellant Failed to Timely Join Respondents to the Underlying Lien Foreclosure Action.

The pertinent facts supporting the trial court's entry of summary judgment on this front are simple and without dispute:

- On November 25, 2008, Appellant caused three (3) separate mechanic's liens to be recorded against the subject property owned by Monument Heights, LLC and which were encumbered by Respondents' deed of trust. (39244-2011 R., Vol. 2, p. 274, ¶ 2.2).
- On May 11, 2009, Appellant subsequently commenced this action by which it primarily sought to judicially foreclose each of its liens. (39244-2011 R., Vol. 1, p.148-72). At that time, Appellant only named Monument Heights, LLC and John and Jane Doe 1-100, as defendants to the lien foreclosure action. *Id.*
- On December 18, 2009, more than one year after Appellant recorded its mechanic's liens, it filed an amended pleading thereby joining the Respondents and asserting priority to their beneficial interest in the subject property; *Amended Verified Complaint.* (39244-2011 R., Vol. 1, p. 185-193). By its amended pleading, Appellant has asserted that each of its liens are senior and takes priority to the Respondents' beneficial interest in the subject property. (39244-2011 R., Vol. 2, p. 273-275).

There is no dispute that on August 6, 2008, a *Deed of Trust* was duly recorded with the Kootenai County Recorder granting the Respondents a beneficial interest in the subject property. (39244-2011 R., Vol. 1, p. 189, ¶ 2.7; 39244-2011 R., Vol. 2, p. 275, ¶ 2.7). The public document expressly names each of the beneficiaries, their respective interest in the security instrument, and unambiguously describes the property encumbered thereby. (Aug. R., *Aff. of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 1). It is also equally clear that the instrument was a matter of public record for over three (3) months before Appellant initiated the underlying district court action.

Thus, Appellant cannot escape the unavoidable fact that it failed to join the Respondents to the underlying lien foreclosure action within six (6) months after it recorded each of its mechanics liens. Consistent with the well established and recently affirmed appellate authority in Idaho, the trial court properly concluded that Appellant's mechanic's liens were rendered lost and unenforceable against Respondents' beneficial interest in the subject property due to its failure to timely join them. (Aug. R., *Partial Summary Judgment Against Kasco of Idaho, LLC*, issued January 18, 2011).

3. Appellant's Assertion that its Failure to Timely Join Respondents was Excused Due to a Want of Notice, is Without Any Basis in Law and Contrary to the Established Record.

In an attempt to divert attention from its failure to comply with I.C. § 45-510, Appellant asserts in tenuous fashion "that there were genuine issues as to material facts as to the confusion of title with regard subject property." *App. Brief*, p. 14. For this reason, Therefore, it suggests this Court should grant it extraordinary equitable relief from the operation of I.C. § 45-510.

To begin, it is important to observe that Appellant has never suggested, much less demonstrated, that Respondents' deed of trust was not duly recorded or part of the chain of title for the subject property prior to filing suit. Rather, the record clearly demonstrates that, at a minimum, Appellant possessed constructive notice of Respondents' interest in the subject property well before filing suit. Idaho's recording act provides that properly recorded instruments have the effect of imparting constructive notice to all concerned parties. I.C. §§ 55-

809 and 55-811; *Adams v. Anderson*, 142 Idaho 208, 212 (2005). In the matter at hand, the record demonstrates:

- On February 28, 2007, Independent Mortgage Ltd., Co. ("Independent Mortgage") agreed to loan $1,240,000.00 ("first loan") to a group of borrowers which included Richard Abbey, Keri Abbey, Chad Ross, Brenny Ross, Chad Johnson and Roger Glessner. At that time, each of the borrowers were members of Monument Heights, LLC, the Defendant named in this action. (Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho,* LLC, ¶ 3).

- In consideration of the first loan, the borrowers executed and delivered to Independent Mortgage Ltd., Co. a *Mortgage* of various parcels of real property in Kootenai County, Idaho, to secure performance and repayment of the loan. *Id.*, at ¶ 4. The *Mortgage* was recorded with the Kootenai County Recorder on February 28, 2007 as Instrument No. 2085500000. (Aug R., *Supp. Aff. of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 2).

- As further security for the first loan, the borrowers executed and delivered to Independent Mortgage Ltd., Co. a *Timber Deed.* (Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho*, ¶ 5). The *Timber Deed* was recorded with the Kootenai County Recorder on March 7, 2007 as Instrument No. 2086808000. (Aug R., *Supp. Aff. of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 3).

- Subsequently, Independent Mortgage Ltd., Co. assigned its interest in the *Promissory Note*, *Mortgage*, and *Timber Deed* to two of the Respondents; Dan S. Jacobson and Sage Holdings, LLC. (Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho*, ¶ 6). Mr. Jacobson and Sage Holdings, LLC each assumed a 50% interest in the note and related security instruments. *Id.*

- On or about August 2008, the *Promissory Note* secured by the *Mortgage* was fully satisfied. *Id.*, at ¶ 8. Consistently, on August 10, 2007 a *Partial Satisfaction* was recorded with the Kootenai County Recorder as Instrument No. 2115763000. (Aug R., *Supp. Aff. of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 4).

  Prior to satisfaction of the first loan, Respondents, Dan S. Jacobson and Sage Holdings, LLC, executed a *Quitclaim Deed* releasing their interest in the harvestable timber located on the real property. (Aug. R., *Supp. Aff. of Casey S.*

Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, ¶ 8). The instruments states "THE PURPOSE OF THIS QUITCLAIM DEED IS TO RELEASE ANY AND ALL INTEREST THE GRANTORS MAY HAVE TO ANY AND ALL MERCHANTABLE TIMBER LOCATED ON SAID DESCRIBED REAL PROPERTY." *Id.*

- Upon satisfaction of the *Promissory Note*, the escrow agent for the first loan was instructed to release and record the *Quitclaim Deed. Id.* As a result, the *Quitclaim Deed* was recorded with the Kootenai County Recorder on August 19, 2008 as Instrument No. 2174357000. *Id.*

- After the first loan was paid off, each of the Respondents collectively agreed to loan Monument Heights, LLC a sum of money ("second loan"). (Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho*, ¶ 9).

- In consideration, Monument Heights, LLC executed and delivered a *Deed of Trust* conveying the subject real property to a trustee as security for the second loan. (Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho*, ¶ 10; *Aff. of Jonathon D. Hallin in Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho, LLC*, Ex. 1). This instrument was duly recorded with the Kootenai County Recorder on August 5, 2008 as Instrument No. 2172582000. *Id.*

- On November 25, 2008, Appellant caused three (3) separate mechanic's liens to be recorded against the subject property owned by Monument Heights, LLC. (39244-2011 R., Vol. 2, p. 274, ¶ 2.2).

- On May 11, 2009, Appellant subsequently commenced this action by which it primarily sought to judicially foreclose each of its liens. (39244-2011 R., Vol. 1, p.148-72). At that time, Appellant only named Monument Heights, LLC and John and Jane Doe 1-100, as defendants to the lien foreclosure action. *Id.*

Thus, it is beyond debate that Appellant had at least constructive notice of Respondents' interest both prior to recording its mechanic's liens and filing this subsequent action to foreclose those liens.

In its Brief, Appellant frames the issues as such:

> the subsequent recording of the Quitclaim Deed on August 19, 2008, transferred the property from the Respondents to Monument Heights, LLC, and or the

> subsequent recording by the Respondents caused confusion with the record of title and notice to the Appellant and therefore Appellant should be relieved from the 6-month requirement as a result.

App. Brief, p. 14. To provide some semblance of order to Appellant's argument, Respondents will address these arguments in the following fashion: (1) the legal significance of the quitclaim deed; and (2) the import of Appellant's subjective confusion as to the effect of the quitclaim deed.

First, Appellant's argument misstates and embellishes the effect of the quitclaim deed. For starters, the instrument is only included in the chain of title between the parties to the "first loan"; ie: Richard Abbey, Keri Abbey, Chad Ross, Brenny Ross, Chad Johnson, Roger Glessner, and Dan S. Jacobson and Sage Holdings, LLC, as successors in interest to Independent Mortgage. After the first loan was paid off, the Respondents were granted a subsequent deed of trust encumbering the real property then owned by Monument Heights, LLC. Even if one were to disregard the separate chains of title at issue, the quitclaim deed was only executed by two of the five beneficiaries subsequently named in the *Deed of Trust*; Dan S. Jacobson and Sage Holdings, LLC. Put another way, Appellant has offered no suggestion or evidence that the other three Respondents, Steve Lazar, the Martin Family Trust, or Devon Chapman, ever released their interest in the subject property or that it was somehow mislead as to their claimed interests.

More importantly, Appellant's argument also reflects a deep misunderstanding of the operation of a deed of trust. "Idaho is a title theory state, whereby a deed of trust is a title-passing procedure." *ParkWest Homes, LLC v. Barnson*, 154 Idaho 678, 302 P.3d 18, 24 (2013); *see also* I.C. § 45-1513 ("A deed of trust . . .shall be a conveyance of real property.") Consequently. "when a deed of trust is executed and delivered, the legal title of the property passes to the trustee", not the beneficiary. *Id.*; see also I.C. § 45-1502(3) and (4).

In its Brief, Appellant does not suggest how a beneficiary could unilaterally convey the legal title held by a trustee under a deed of trust. Quite to the contrary, it is important to observe that it is the trustee, not the beneficiary, who reconveys the legal title following satisfaction of the obligation secured by the deed of trust. I.C. § 45-1514. With limited exceptions, a title

insurer or title agent may similarly release a deed of trust upon satisfaction of the underlying obligation. I.C. § 45-1201, *et seq.* In sum, the quitclaim deed had no legal effect on the legal title of the estate of real property held by the trustee under the deed of trust. For this additional reason, Appellant's argument must fail.

Second, Appellant maintains that the series of title documents executed and recorded between Monument Heights, LLC and Respondents caused it to become confused as to the status of title. (Aug. R., *Brief in Support of Objection to Motion for Summary Judgment*, p. 3); see also App. Brief, p. 16. Appellant goes on to suggest that it was this same confusion that caused it to name "John and Jane Does 1-100" as defendants to its initial pleading. In support of its opposition to summary judgment, Appellant's manager averred:

> [Appellant's owner, manager and member] went to the records department at Kootenai County Idaho and researched the title of the property and located the Quitclaim Deed from [Respondents] Jacobson and Sage Holdings, attached hereon as Exhibit 3, based upon your affiant's prior contacts with ROGER GLESSNER, [Appellant] relied on said deed in believing that any deed of trust with regard said property was satisfied since said deed was the last to be recorded which purportedly transferred all interest in and to subject property to the members of MONUMENT HEIGHTS.
>
> [Appellant] relied on the record at Kootenai County when he relayed to counsel all parties your affiant believed had interest in and to subject property.

(Aug. R., *Supp. Aff. of Keith Sims in Support of Mot. for Reconsideration*, ¶¶ 2, 11 and 13).

As the lien claimant, Appellant bore the burden to: (1) timely file suit to foreclose its mechanic's lien and (2) join each of the interested parties whose rights, estates, or interests are claimed to be adverse and subordinate. *See Cont'l & Commercial Trust & Sav. Bank*, 222 F. 781 at 788. It was not necessary that the Appellant subjectively understand the nature of the respective interests in the subject property prior to joining interested parties. Furthermore, it is not necessary that a lien claimant first subjectively determine which subordinate interests are valid and those which are not before filing suit. Along these same lines, there is no authority establishing that a lien claimant is excused from I.C. § 45-510 unless and until it possesses actual notice of each respective subordinate interest.

To placate its putative confusion regarding title, Appellant could have obtained a litigation guarantee from a licensed title insurer which would have disclosed each interested party. By not availing itself of this option, Appellant unilaterally assumed the risk of loss due to its failure to adequately investigate the chain of title and timely join all interested parties.

Next, Appellant ignores the clear and unambiguous language in the quitclaim deed which expressly provides that it only pertains to the merchantable timber located on the subject property. As noted supra, the deed provided in bold typeface:

> THE PURPOSE OF THIS QUITCLAIM DEED IS TO RELEASE ANY AND ALL INTEREST THE GRANTORS MAY HAVE TO ANY AND ALL MERCHANTABLE TIMBER LOCATED ON SAID DESCRIBED REAL PROPERTY.

(Aug. R., *Supp. Aff. of Casey S. Krivor In Support of Defendants' Second Motion for Summary Judgment Against Kasco of Idaho*, ¶ 8). Had Appellant reviewed the *Quitclaim Deed* as he averred, this express and conspicuous reservation should have quickly dispelled any confusion in Appellant.

Next, Appellant's reliance on *Bonner Bldg. Supply, Inc. v. Std. Forest Prod., Inc.* is misplaced. 106 Idaho 682 (Ct. App. 1984). From a procedural standpoint, *Bonner* is a unique case. That appeal started as an action to quiet title between a lien claimant and judgment lienor, both of which claimed to hold competing legal titles to the subject property. *Id.*

In that case, the judgment lienor obtained a foreign judgment against a "Chuck Britton," which was an alias used by Paul Cims. *Id.* at 683-84. Afterwards, it domesticated the judgment in Idaho against "Chuck Britton" and subsequently executed against real property owned by judgment debtor. *Id.* At the sale, the judgment lienor purchased the lot. *Id.* Following the sale and expiration of the redemption period, the judgment lienor was granted a sheriff's deed. *Id.*

Prior to when the judgment lienor domesticated its foreign judgment, the lien claimant furnished building materials to Mr. Cims. *Id.* After Mr. Cims failed to pay for the materials, the lien claimant filed a mechanic's lien which was recorded after the sheriff's sale. *Id.* Then the lien claimant timely filed suit to foreclose its mechanic's lien but did not name the judgment

lienor. *Id.* The lien claimant was ultimately granted a default judgment and purchased the property at a subsequent sheriff's sale. *Id.* Following expiration of the redemption period, the lien claimant was similarly granted a sheriff's deed to the same parcel of real property. *Id.* Upon discovering that the judgment lienor also possessed a sheriff's deed for the property, the lien claimant filed a subsequent action to quiet title to the real property.

Much like the case at bar, the Court of Appeals held that due to the lien claimant's failure to "foreclose against [the judgment lienholder] within six months of the filing of its claim of lien, it lost its lien against the property in regard to the [judgment lienor]." *Id.*, at 686. It is important to note that the Court of Appeals reached this conclusion despite its concern that a material issue of fact existed as to whether judgment lien properly appeared in the chain of title due use of an alias. *Id.*, at 686. As such, it remanded the case to the trial court to determine whether the lien claimant was entitled to equitable relief from the quieting title. *Id.* More importantly, the Court of Appeals did not excuse the lien claimant's failure to timely join the judgment lienor to the foreclosure action despite its stated concern as to whether the lien claimant had constructive notice of the judgment lien.

Unlike that in *Bonner Bldg. Supply, Inc.*, the record demonstrates that Appellant had constructive notice of Respondents' deed of trust prior to recording its liens and filing this action. Appellant's confusion stems from a lack of understanding and failure to properly investigate the chain of title as opposed to any errors or omissions in the instruments of record. For these important distinguishing factors, *Bonner Bldg. Supply, Inc.* lends no support to Appellant's suggestion that it is entitled to extraordinary equitable relief from the operation of Idaho Code § 45-510.

4. Appellant has Failed to Demonstrate Error by way of Specific References to the Transcripts and Record.

As the Appellant, it bore the burden of demonstrating the complained of error in the record. *Edwards v. Mortgage Electronic Registration Systems, Inc.*, 154 Idaho 511, 300 P.3d 43, 52 (2013). "Unless the appellant affirmatively demonstrates error from the record, this Court

presumes that the trial court's decision was proper." *Id.* Along these lines, Idaho Appellate Rules remind Appellants as follows:

> **Appellant's Brief.** The brief of the appellant shall contain the following divisions under appropriate headings:
>
> . . .
>
> **Argument.** The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

I.A.R. 35(a)(6). Further, this Court has held on numerous occasions "'if issues on appeal are not supported by propositions of law, authority or argument, they will not be considered . . . A party waives an issue on appeal if either authority or argument is lacking, not just if both are lacking.'" *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 18 (2012).

In support of its first issue, Appellant devotes a considerable amount of effort at citing this Court to what it feels is controlling authority. Despite this, much of the putative facts recited throughout Appellant's analysis are not supported by any references to the transcript or record. In the few instances where Appellant does cite to the record, it merely provides generalized cites without any pinpoint references. Due to the deficient manner in which Appellant presents this issue, it should be deemed to have waived it upon appeal. Alternatively, Respondents submit that this Court must presume the trial court's award of summary judgment was proper and therefore affirm the same.

5. Appellant's Colorful Argument that I.R.C.P. 17(d) Tolls the Requirements of I.C. § 45-510 is Amusing, at Best.

In its Brief, Appellant suggests without much by way of reasoned analysis, that I.R.C.P. 17(d) somehow excused it from the more specific and controlling six months period of limitations as defined by I.C. § 45-510. To begin, it must be noted that I.R.C.P. 17(d) is merely a court rule of procedure. That Rule simply provides:

> **(d) Unknown Owners or Heirs as Parties.** In all actions or proceedings to obtain title or possession, or to remove adverse claim of title, or to quiet title, or for partition, or for sale, or for foreclosure of any incumbrance, or enforcement of any

> trust, or specific performance of any contract, or for any other disposition of any property, real, personal, or mixed, situated within the state of Idaho including choses in action either situated within or due or claimed to be due from persons, firms or corporations resident within the state of Idaho, persons may be made parties defendant either on the filing of the complaint, counterclaim or cross-claim, as the case may be, or at any time thereafter by amendment thereof, by the name and description of unknown owners, or unknown heirs or unknown devisees of any deceased person, or by any of such designations.

I.R.C.P. 17(d). Appellants' contention that the requirements of I.C. § 45-510 must yield to I.R.C.P. 17(d) confuses the hierarchy of laws. It would be an odd inversion of this hierarchy if Rule 17(d) somehow relaxed the heightened six-month period of limitations as mandated by I.C. § 45-510. *U.S. v. Scheffer*, 523 U.S. 303, 312 (1998).

More alarming, Appellant seemingly suggests that I.R.C.P. 17(d) should be liberally applied to further the underlying purposes of Idaho's mechanic's lien act; I.C. § 45-501. Respondents' acknowledge the longstanding body of law seemingly cited by all lien claimants which states that "the provisions of I.C. § 45-501 are to be liberally construed in the favor of the persons who perform labor upon or furnish materials to be used in the construction, alteration, or repair of a building or structure." *L & W Supply Corp.*, 136 Idaho at 742-43; citing *Great Plains Equip., Inc.,* 132 Idaho at 760. Appellant, however, fails to recognize the more pertinent line of authority which holds "th[at] rule, however, 'does not permit the court to create a lien where none exists or was intended by the legislature.'" *Id.*, at 743.

Once again, it must be noted for the Appellant that "the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone." *Western Loan & Bldg. Co.*, 185 P. at 555. Thus, its request that the time limitations imposed by I.C. § 45-510 be softened by I.R.C.P. 17(d) would have the effect of "creating a lien [ie. liability] where none exists." For these fundamental reasons, Appellant's argument fails.

B. The District Court did not Abuse its Discretion in Denying Appellant's Continuance Motion.

Appellant claims in perfunctory manner that the trial court abused its discretion in refusing to grant its requested continuance to the hearing on Respondents' third motion for

summary judgment. First, Appellant has failed to adequately preserve the record on this front. Second, Appellant should be deemed to have waived this issue due to the deficient manner in which it is presented on appeal. Third, without challenging the underlying grant of summary judgment, Appellant has failed to demonstrate how the denial amounts to anything but harmless error. Finally, the Supreme Court has previously held in situations akin to the matter at hand, that the failure to diligently prosecute an action is grounds for denial of a motion to continue.

To begin, the Appellant has merely provided this Court with a transcript from the hearing on Respondents' third motion for summary judgment. (Tr. p. 27-61). Appellant, however, has failed to include a copy of its motion to continue in the Clerk's Record. This oversight, however, is perhaps overshadowed by the fact that Appellant failed to serve the trial court with a copy of the putative motion prior to the scheduled summary judgment hearing. (Tr. p. 37, L. 10). Further, the Appellant has failed to include a copy of Respondents' objection which was considered by the trial court in arriving at its reasoned decision. (Tr. p. 39, ls. 13-16).

As the Appellant, it bore the affirmative duty to demonstrate error. *Student Loan Fund of Idaho, Inc. v. Duerner*, 131 Idaho 45, 54 (1997). "When the record on appeal does not contain the evidence taken into account by the district court, 'we must necessarily presume that the evidence justifies the decision and that the findings are supported by substantial evidence.'" *Id.*; accord *Fritts v. Liddle & Moeller Const., Inc.*, 144 Idaho 171, 174 (2007) ("In the absence of a proper record on appeal, we must assume there is substantial competent evidence to support the trial court's decision."). Due to Appellant's failure to adequately preserve the record on appeal, there is no basis for this Court to conclude that the trial court's denial of its motion to continue amounts to an abuse of discretion.

Most recently, this Court held "'if issues on appeal are not supported by propositions of law, authority or argument, they will not be considered . . . A party waives an issue on appeal if either authority or argument is lacking, not just if both are lacking.'" *Hurtado*, 153 Idaho at 18; citing *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 16 (2007); accord *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (Holding it is a well "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed

waived."). In an oft-quoted phrase, the Seventh Circuit Court of Appeals remarked that appellate judges "are not like pigs, hunting for truffles buried in briefs." *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

In its Brief, Appellant merely relies upon one appellate decision, which it suggests stands for the proposition "if the District Court's denial of a motion for continuance deprives the applicant of a fundamentally fair trial, the appellate courts can overturn the ruling." *See Lambert v. Northwestern Nat. Ins. Co.*, 115 Idaho 780 (Ct. App. 1989). Appellant's sole reliance upon the *Lambert* decision is misplaced as the *Lambert* decision was focused on whether the trial court erred in granting the defendant's motion to continue a trial to secure an expert witness' attendance. *Lambert*, 115 Idaho at 782. Beyond the fact that continuances are committed to the sound discretion of the trial court, the *Lambert* decision has no import to the situation at hand; that being, whether the trial court properly exercised its discretion in denying Appellant's motion to continue a summary judgment hearing.

Moreover, Appellant's Brief fails to direct this Court to specific instances in the record and transcripts which demonstrate the trial court abused its decision. This oversight is further compounded by a complete lack of analysis. Due to a lack of controlling authority, reasoned analysis, and pertinent cites to the record and transcript, Appellant should be deemed to have waived this issue on appeal.

Thirdly, Appellant has failed to demonstrate that a substantial right has been affected, which again, is a fatal flaw. Rule 61, Idaho Rules of Civil Procedure, states:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

On appeal, Appellant only challenges the trial court's denial of its motion to continue. Surprisingly, it does not take issue with the trial court's decision granting Respondent's third

motion for summary judgment. This oversight is amplified by the fact that the Appellant has yet to make a proffer of the nature of the deposition testimony that it was unable to provide to the trial court prior to the summary judgment hearing.

Without a proffer, there was no basis for the trial court of this Court to assess the admissibility or relevance of the evidence. Further, Appellant has made no demonstration that the testimony could have the possibly created a genuine issue of material fact sufficient to survive summary judgment. Thus, there was no basis for the trial court to conclude the requested continuance was warranted and outweighed the inherent inconvenience, delay, and further expense to the parties. For this reason, Respondents submit the record can only yield one conclusion; the complained of error was anything but harmless.

Finally, the situation at bar is on par with that recently dispatched in *Boise Mode, LLC*, 294 P.3d at 1116. In that case, the Court began by noting the moving party seeking a Rule 56(f) continuance "must do so in good faith by affirmatively demonstrating why [they] cannot respond to a movant's affidavits and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Id.* Furthermore, "the movant has the burden of setting out what further discovery would reveal that is essential to justify their opposition, making clear what information is sought and how it would preclude summary judgment." *Id.* Recognizing the policies exposed by art. I, § 18 of the Idaho Constitution and I.R.C.P. 1, the Court went on to hold "the legal standard governing the district court's exercise of discretion when deciding a Rule 56(f) motion permits consideration of the moving party's previous lack of diligence in pursuing discovery." *Id.*, at 1117

In *Boise Mode*, the defendant noticed its summary judgment motion for hearing 63 days before the scheduled trial. In response, the plaintiff moved for a 56(f) continuance on the basis the defendant's discovery responses, which it had received over six months earlier, were insufficient. *Id.* Further, the motion to continue was filed 17 days prior to the discovery cut-off and 2 ½ months prior to trial. *Id.* With these facts in mind, the district court denied the plaintiff's motion noting it "did not provide sufficient reasoning as to why six months intervened between

the receipt of initial discovery answers, which they allege were unsatisfactory, and any attempt to discover additional relevant information."

Turning the matter at hand, Appellant commenced this action on May 11, 2009. (39244-2011 R., Vol. 1, p.148-72). On December 18, 2009, Appellant filed an amended pleading by which the Respondents were joined to this action and asserted a cause of action for "Quantum Merit" [sic]. On January 24, 2011, over one full year after the amended pleading was filed, Respondents timely filed and served their third motion for summary judgment challenging Appellant's cause of action for "Quantum Merit." (Aug. R., *Defendants' Third Motion for Summary Judgment Against Kasco of Idaho, LLC*).

Although it still remains unclear, Appellant purports to have filed a motion to continue and motion to shorten time either the day of, or the business day prior to, the scheduled hearing.[2] On February 22, 2011 at 8:21 a.m., Appellant filed its opposition to Respondents' motion for summary judgment. (Aug R. at *Brief in Support of Objection to Jacobson's [sic] Third Motion for Summary Judgment*). A hearing on the Motion was subsequently conducted that same day at 3:00 p.m. (Tr. p. 27-47).

At the time Respondents filed their third motion for summary judgment, this matter had been pending for over 1 ½ years. Moreover, Appellant's "Quantum Merit" claim had been pending against Respondents for over 13 months before they moved for summary judgment. More importantly perhaps, a trial was scheduled to commence a little more than two months after the hearing date.

Much like the moving party in *Boise Mode*, Appellant had ample time and opportunity to conduct discovery before Respondents filed their third motion for summary judgment. Despite this obvious fact, Appellant offered no explanation why it was not able to conduct or obtain the deposition testimony any earlier. Further, it cannot go without noting that both Appellant's

[2] The hearing took place on Tuesday, February 22, 2011. President's Day Holiday was observed on Monday, February 21, 2011. A copy of Appellant's motion to continue is not included in either the original Clerk's Record or Augmented Record. Further, there is no indication in the transcript as to exactly when the motion was filed with the trial court. (Tr. p. 37, L. 10 – p. 39, L. 4). Despite counsel's representation, there is nothing in the transcripts or record indicating the fax confirmations were presented to the trial court. (Tr. p. 39, ls. 3-4).

opposition and motion to continue were submitted extremely late. Despite the lack of proper notice, Appellant has not offered any explanation as to why it failed to timely seek a continuance in accordance with the time parameters of I.R.C.P. 7(b)(e).

Akin to that in *Boise Mode*, Appellant has further failed to explain why it was still actively developing the facts supporting the prima facie case for each of its causes of action approximately two months before the trial was to commence. Disregarding any possible violations of I.R.C.P. 11(a)(1) that may have occurred when the amended pleading was filed, it is disheartening to think that the party bearing the burden of proof is without any evidence which to support its causes of action sufficient to defeat summary judgment two months before trial.

To force Respondents to sit idle while Appellants fumble their way through this action in attempt to cobble together a prima facie case is contrary to policies exposed by both art. I, § 18 of the Idaho Constitution and I.R.C.P. 1. Disregarding the deficient manner in which this issue is presented on appeal, Respondents submit that Appellant's claim similarly fails substantively.

C. Appellant has Failed to Demonstrate how the Trial Court Erred in Awarding Fees and Costs to Respondents.

In an attempt to challenge the trial court's award of attorney's fees and costs, Appellant advances a confused, multi-front attack. Appellant begins by casually attacking the trial court's analysis of the requested fees under the factors set forth by I.R.C.P. 54(e). Next, Appellant contends there was no requisite "commercial transaction" to support the trial court's award under I.C. § 12-120(3). Then, Appellant maintains its arguments regarding priority were not frivolous or unreasonable. Afterwards, it goes on to argue the trial court's award of fees under I.C. § 12-121 was in error as the case was not brought frivolously. Finally, Appellant finishes out by arguing that the fees should not have been awarded as they did not relate to the priority of liens. To provide some order to this confusing challenge, Respondent will address each argument in the manner in which they are raised.

1. Appellant has Failed to Demonstrate that the Trial Court Abused its Discretion in Calculating Reasonable Attorney's Fees.

In rather casual fashion, Appellant maintains that trial court erred in employing the factors set forth under I.R.C.P. 54(e)(e) when assessing the reasonableness of Respondents' claimed fees. While Appellant does cite the Court to limited controlling authority interpreting I.R.C.P. 54(e)(3), it fails to demonstrate by way of developed argument and references to the transcript and record, how the trial court abused its broad discretion.

"When awarding attorney's fees, a district court must consider the applicable factors set forth in I.R.C.P. 54(e)(3) and may consider any other factor that the court deems appropriate." *Lettunich v. Lettunich*, 145 Idaho 746, 750-51 (2008). "Rule 54(e)(3) does not require the district court to make specific findings in the record, only to consider the stated factors in determining the amount of the fees. When considering the factors, the courts need not demonstrate how they employed those factors in reaching an award amount." *Id.* " The bottom line in an award of attorney fees is reasonableness." *BECO Const. Co., Inc. v. JUB Engineers, Inc.*, 149 Idaho 294, 297 (2010). In reaching that determination, the Supreme Court has remarked:

> What is a reasonable attorneys' fee is a question for the determination of the court, taking into consideration the nature of the litigation, the amount involved in the controversy, the length of time utilized in preparation for and the trial of the case and other related factors viewed in the light of the knowledge and experience of the court as a lawyer and judge; it is not necessary in this connection that he hear any evidence on the matter although it is proper that the court may have before it the opinion of experts.

BECO Const. Co., Inc., 149 Idaho at 297; citing *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 281 (1977).

In its Brief, Appellant makes quite a few broad assertions regarding the nature of the attorney's fees awarded to the Respondents. It fails, however, to cite this Court to any instances in the transcript or record which demonstrate that the trial court abused its discretion. Moreover, there is absolutely no analysis of how the trial court abused its discretion. As such, all this Court

is left with is generalized authority and conjecture from the Appellant. Once again, due to the undeveloped manner in which Appellant has presented this issue, it should be deemed to have waived it on appeal. *Hurtado*, 153 Idaho at 18.

2. Appellant's Numerous Allegations of a "Commercial Transaction" Were Sufficient to Trigger an Award of Fees Under I.C. § 12-120(3).

The Idaho Supreme Court has held that I.C. § 12-120(3) is not available where the action solely seeks judicial foreclosure of a mechanic's lien. *L&W Supply Corp.*, 136 Idaho at 742. Contemplating situations like the matter at hand, it has further noted:

> . . . if more than one claim is pled, there can be more than one 'gravamen,' and attorney fees can still be awarded for a specific claim, if a claim is of the type covered by I.C. § 12-120(3) 'even though a claim is covered by other theories that would not have triggered application of the statute.'

Great Plains Equip., Inc., 136 Idaho at 472.

Idaho Code § 12-120(3) broadly provides for an award of fees to the prevailing party where the underlying claim involved a "commercial transaction." "An award of attorney fees under Idaho Code § 12-120(3) is proper if 'the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.'" *Blimka v. My Web Wholesaler, LLC*, 143 Idaho 723, 728 (2007).

A contract between the parties is not a prerequisite to an award of fees under 12-120(3). "Where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), that claim triggers the application of I.C. § 12-120(3) and a prevailing party may recover fees even though no liability under a contract was established." *Property Mgmt. West, Inc. v. Hunt*, 126 Idaho 897, 900 (1995). Thus, "allegations in the complaint that the parties entered into a commercial transaction and that the complaining party is entitled to recover based upon that transaction, are sufficient to trigger the application of I.C. § 12-120(3)." *Garner v. Povey*, 151 Idaho 462, 470 (2011).

Since Respondents were joined to this action, they have been forced to defend two alternative causes of action against; breach of contract; and quantum meruit. In each of the

numerous amended pleadings Appellant has filed in this action, it has consistently alleged the existence of a contract between itself and all of defendants:

> 3.1 A valid contract between the owners . . . and **all** DEFENDANTS individually, as owners for KASCO to provide labor, materials, and services relating to the subject property.
> 3.2 KASCO performed its obligations under the contract with DEFENDANTS individually and as owners, and/or agents for owners.
> 3.3 DEFENDANTS individually, as owners, and or as agents for owners breached the contract by failing to pay KASCO the amount for its labor, materials and or services in the sum of $140,378.00 plus interest at the highest lawful rate.
> 3.4 This contract was a commercial transaction such that KASCO is entitled to attorney fees as previously alleged and pursuant to Idaho Code Sections 12-120(3) and also under 12-120.

(39244-2011 R., Vol. 1., p. 190, ¶¶ 3.1-3.4; 39244-2011 R. Vol. 2, p. 276, ¶¶ 3.1-3.4) (emphasis added). Similarly, Appellant has consistently maintained throughout these proceedings that it is entitled to an award of attorney's fees under I.C. § 12-120(3) on the basis that a "commercial transaction" was involved. Ultimately, these suggestions failed for a want of legal and factual support.

Based upon the record and files presented at the trial court level, Respondents submit that Appellant should be estopped, judicially or equitably, from asserting there was no requisite "transaction" between itself and the Respondents. *Accord Erickson v. Flynn*, 138 Idaho 430, 437 (2003) ("In these circumstances, we conclude that it would defeat the legislative purpose of § 12-120(3)-to allow the prevailing party to recover attorney fees expended in litigating a commercial transaction claim-if [the defendant] were not allowed to recoup his attorney fees for defense of the quasi-contract claims in this case."). Had Appellant prevailed on these causes of action, it is likely that it would have recovered its fees under I.C. § 12-120(3). Following this line of reasoning, there is no basis to treat the Respondents differently, but for Appellant's failure to demonstrate a requisite "transaction" between the parties.

Due to Appellant's decision to generally assert a breach of contract and quantum merit [sic] claim against the class of "Defendants," Respondents were forced to incur fees and costs in defense thereof. Appellant put Idaho Code § 12-120(3) into play when it made a calculated

decision to assert a breach of contract claim against "DEFENDANTS." Further, it also triggered operation of the statute when it claimed entitlement to an award of fees this statute. Appellant should not be allowed to play fast and loose with the judiciary through the constant shift in positions and theory of its case. Therefore, Respondents submit that the trial court properly concluded that they were entitled to an award of fees pursuant to Idaho Code § 12-120(3).

3. Appellant's Contention Regarding the Reasonableness of its Argument for Seeking A Reversal of Existing Law Are Misplaced.

The third-prong of Appellant's challenge to the award of attorney's fees is a confusing mix of block citations and undeveloped argument. First, Appellant begins by citing the standards for an award of sanctions under Rule 11(a)(1)[3] and I.C. § 12-123. The relevance of Appellant's reliance on this authority is yet to be seen as neither were invoked by the trial court in making its award of attorney's fees and costs to the Respondents. (Aug. R. *Order Approving Attorney's Fees and Costs*).

Next, Appellant claims that it did not bring this action frivolously as its "arguments centered around a good faith attempt to show the need for a reversal" of existing law, to wit, I.C. § 45-510. *App. Brief*, p. 28. Lest Appellant has forgotten, Respondents' motion for fees and the trial court's subsequent award, were strictly limited to those fees incurred defending the "breach of contract and equitable claims filed by Plaintiff, Kasco of Idaho, LLC." (Aug. R.,*Memo. of Costs and Attorney's Fees*, p. 3, ¶ 9). Once again, it has yet to be demonstrated how Appellant's subjective intention to seek a reversal of I.C. § 45-510 is relevant to the trial court's award of fees incurred by Respondents successfully defending against the alternative causes of action.

[3] Appellant's Brief fails to clarify what set of Rules it refers to. Presumably, it is a reference to I.R.C.P. 11(a)(1).

4. The Trial Court's Award of Attorney's Fees Was Proper Under I.C. § 12-121.

Idaho Code § 12-121 provides:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Of further assistance, Rule 54(e)(1), I.R.C.P., defines those instances where an award under I.C. § 12-121 is warranted:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it finds, from the facts presented to it, that the case was *brought, pursued or defended frivolously, unreasonably or without foundation* . . .

If an award under that section is made, the trial court is to "make a written finding, either in the award or in a separate document, as to the basis and reasons for awarding such attorney fees." I.R.C.P. 54(e)(2).

Attorneys fees per Idaho Code § 12-121 are appropriate "when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *McGrew v. McGrew*, 139 Idaho 551, 562 (2003). "When deciding whether the case was brought, pursued, or defended frivolously, unreasonably, or without foundation, the entire course of the litigation must be taken into account." *Id.* "Even though an action might be proper at its commencement, facts might thereafter develop which indicate that the case was then pursued frivolously, unreasonably, or without foundation." *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 754 (2002).

At the hearing conducted on November 19, 2012, the trial court awarded attorney's fees to the Respondents pursuant to I.C. § 12-120(3) and I.C. § 12-121. (Tr. p. 91, L. 26 – p. 92, L. 14). Consistent with I.R.C.P. 54(e)(2), the trial court subsequently issued written findings as to the basis for its award of fees under I.C. § 12-121. Specifically, the trial court found:

> In accordance with Rule 54(e)(2), I.R.C.P., this Court concludes that this action was brought and pursued frivolously, unreasonably and without foundation for the following reasons:
>
> a. Plaintiff broadly asserted alternative causes of action for breach of contract and quantum meruit against the Defendants;
>
> b. Plaintiff lacked a sufficient basis in fact or law to support asserting these alternative causes of action against the Defendants;
>
> c. Plaintiff has never agreed to voluntarily dismiss these claims;
>
> d. Defendants could not ignore these claims. As result, Defendants incurred the claimed reasonable attorney's fees in obtaining dismissal and a final judgment as to each of these alternative claims; and
>
> e. Under the circumstances, the Court finds and concludes that an award of the Defendants' reasonable attorney's fees under I.C. § 12-121 is appropriate.

(Aug. R., *Order Approving Costs and Attorney's Fees*, p. 2); see also (Tr. p. 91, L. 23 – 92, L. 12).

Noticeably absent in its Brief is any discussion by the Appellant of how the trial court's findings under I.R.C.P. 54(e)(2) were erroneous. Rather, Appellants' argument is devoted to legitimizing its decision to join Respondents to this action. Again, the trial court's award of fees was limited to those fees incurred by Respondents defending the alternative causes of action asserted by Appellant. While Appellant may have been justified in joining Respondents to this action, it has yet to establish that it had any basis in fact or law for asserting either of the alternative causes of action against Respondents. Again, it must be emphasized that it was the

Appellant's burden to demonstrate error on appeal. Having failed to do so, Respondents' submit this Court should affirm the trial court's award of fees under Idaho Code § 12-121.

5. The Awarded Fees Were Reasonably Incurred by Respondents Successfully Defending the Alternative Causes of Action Asserted by Appellant During the Course of the Protracted Litigation.

In closing, Appellant argues the "fees were and are excessive and did not relate to the priority of liens which is the reason they were brought into this litigation." *App. Brief*, p. 31. Once again, it is important to remind Appellant that it originally asserted two alternative causes of action against the Respondents which they were forced to defend. As outlined above, the trial court's award was strictly limited to those fees Respondents calculated were incurred defending those causes of action. Appellant contention that the fees do not relate to the priority of liens further demonstrates the confused nature of its appeal.

Next, Appellant asserts in conclusory fashion that Respondents' award of fees should have been limited to the sum of $6,027.00. Unsurprisingly, Appellant fails to demonstrate how this amount was calculated, nor does it include any references to the transcripts or record to substantiate this bold argument. Conversely, Appellant fails to articulate and demonstrate why the balance of the fees awarded to Respondents were not reasonably incurred. Once again, it was the Appellant's burden to demonstrate that the trial court abused its broad discretion in calculating the amount of fees. Due to its failure to articulate through cogent analysis, sound legal argument, along with specific references to the transcripts and record, Appellant has failed to properly meet its burden.

D. Appellant has Failed to Demonstrate that it is Entitled to Fees on Appeal.

In confusing fashion, Appellant asserts that it is entitled to an award of its attorney's fees and costs incurred on appeal. First, Appellant frames the issue on appeal as "Should the Appellants be awarded their costs and attorney fees pursuant to I.R.C.P. 54(d)(1) and Idaho Code §§ 12-120(3) and 12-121 on appeal." In its argument, however, Appellant makes no further reference to either I.C. § 12-120(3) or I.R.C.P. 54(d)(1).

As outlined below, the undeveloped nature of Appellant's claim to fees and costs is fatal to this issue on appeal. Disregarding the deficient manner in which Appellant's claim is presented, it should be noted that the Idaho Rules of Civil Procedure "apply uniformly in the district courts and the magistrate's divisions of the district courts in the state of Idaho. I.R.C.P. 1(a). *Compare* Rule 2(a), I.A.R. ("These rules shall govern all appeals . . . in the Supreme Court."). Lest Appellant has forgotten, this Appeal is pending before the Idaho Supreme Court. As such, it is the Idaho Appellate Rules, not the Idaho Rules of Civil Procedure, which govern the procedures of this Appeal. Thus, it is I.A.R. 41 which provides the procedural mechanism for requesting an award of attorney fees on appeal. Without more, however, this Court has previously held that I.A.R. 41 does not provide it with authority for awarding attorney's fees. *Gilman v. Davis*, 138 Idaho 599, 602-3 (2003).

Next, Appellant cannot recover an award of its attorney's fees incurred on appeal which are related to its foreclosure claim under either I.C. § 12-120(3) or 12-121. To begin, Appellant's lien foreclosure cause of action is governed by I.C. § 45-501, *et seq*. Idaho's appellate courts have consistently held that the attorney's fee provision contained in that Act does not permit an award of fees on appeal. *See First Federal Sav. Bank of Twin Falls v. Riedesel Engineering, Inc.*, 154 Idaho 626, 638 (2012).

Further, Idaho's appellate courts have consistently held "where two statutes appear to apply to the same case or subject matter, the specific statute will control over the more general statute." *Athay v. Stacey*, 146 Idaho 407, 419 (2008). For this reason, the Supreme Court has held "because section 45-513 is a specific statute providing for an award of attorney fees in proceedings to foreclose a mechanic's lien, Idaho Code section 12-120(3) and 12-121, which are general statutes, do not apply." *Parkwest Homes, LLC*, 302 P.3d at 26; accord *First Federal Sav. Bank of Twin Falls*, 154 Idaho at 638. For these reasons, it is clear that neither I.C. § 12-120(3) or 12-121 provides an avenue of relief as to those fees Appellant incurred on its lien foreclosure cause of action.

In its Brief, Appellant devotes two woefully, undeveloped paragraphs of argument. I.A.R. 35(a)(6) provides:

> **Appellant's Brief.** The brief of the appellant shall contain the following divisions under appropriate headings:
>
> . . .
>
> **Argument.** The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

As this Court has held on numerous occasions, the mere citation to a statute or rule, "without providing any argument, is insufficient for an award of attorney fees on appeal." *Sims v. Daker*, 154 Idaho 975, 303 P.3d 1231, 1236 (2013); *accord Peterson v. Peterson*, 153 Idaho 318, 325 (2012); see *also Bagley v. Thomason*, 149 Idaho 799, 805 (2010).

In support of its claim to fees under I.C. § 12-121, Appellant alleges that "Respondent [sic] consistently misrepresented the record throughout the summary judgment and motions for reconsideration hearings." Unfortunately, Appellant fails to develop this assertion with reference to the transcripts or record. Without more, there is nothing by which the veracity of this bold statement can be assessed.

Moreover, Appellant's argument includes one general citation to putative controlling authority. The citation, however, does not direct this Court to any specific quote or language from the case which it claims has bearing on this issue on appeal.

Due to the woefully deficient manner in which Appellant has presented this issue on appeal, its claim to attorney's fees and costs must fail.

E. Respondents are Entitled to an Award of their Costs and Reasonable Attorney's Fees Incurred Defending this Appeal.

Respondents should be awarded their costs and reasonable attorney's fees incurred defending this Appeal pursuant to Rules 11.2, 40 and 41, I.A.R., and Idaho Code § 12-121.

For the same reasons outlined in opposition to Appellant's claimed fees, Respondent concede that I.C. §§ 12-120(3) and 12-121 cannot provide an avenue of relief as to those fees incurred on appeal directly related to Appellant's lien foreclosure claim. With the exception of the first issue, the balance of the issues raised by Appellant on appeal were unrelated to

Appellant's lien foreclosure. Thus, Idaho Code §§ 12-120(3) and 12-121 are available as to issues.

Idaho Code § 12-120(3) broadly provides for an award of fees to the prevailing party where the underlying claim involved a "commercial transaction." "An award of attorney fees under Idaho Code § 12-120(3) is proper if 'the commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover.'" *Blimka* 143 Idaho at 728. As previously noted, "where a party alleges the existence of a contractual relationship of a type embraced by section 12-120(3), that claim triggers the application of I.C. § 12-120(3) and a prevailing party may recover fees even though no liability under a contract was established." *Property Mgmt. West, Inc.*, 126 Idaho at 900. Finally, "Idaho Code §12-120(3) generally mandates an award of attorney fees to the prevailing party on appeal as well as at trial." *Bott v. Idaho State Bldg. Authority*, 122 Idaho 471, 481 (1992).

As discussed above, the trial court previously concluded that the Appellant sufficiently alleged the existence of a commercial transaction with the Respondents sufficient to trigger application of I.C. § 12-120(3). Consistent with this finding, Respondents should be further awarded their fees and costs incurred defending against the three issues raised on appeal by the Appellant which are unrelated to its lien foreclosure claim.

Next, I.C. § 12-121 provides in part:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. . .

"This code section allows the Court the discretion to award attorney fees to the prevailing party." *Belstler v. Sheler*, 151 Idaho 819, 827 (2011).

"Normally, this Court will award attorney fees pursuant to I.C. § 12-121 if the appeal merely invites the Court to reweigh the evidence or second guess the lower court, of if the appeal was brought or defended frivolously, unreasonably, or without foundation." *Id.*; citing *Crowley v. Critchfield*, 145 Idaho 509, 514 (2007). This Court has "repeatedly stated that 'where issues of discretion are involved, an award of attorney fees is proper if the appellant fails to make a

cogent challenge the judge's exercise of discretion.'" *JUB Eng'r, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 318 (2008). "Finally, an award of attorney fees is appropriate if the law is well settled and the appellants have made no substantial showing that the trial court misapplied the law."

Similarly, Rule 11.2, Idaho Appellate Rules, provides:

> (a) . . . The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee.

"A signed legal document violates Rule 11.2 if (1) it is not well grounded in fact; (2) it is not warranted by existing law or a good-faith extension, modification, or reversal of existing law; and (3) it was interposed for an improper purpose." *Lattin v. Adams County*, 149 Idaho 497, 504 (2010).

The Supreme Court has found "that where a party failed to supply an adequate record its appeal was not well grounded in fact and thus violated the first element of I.A.R. 11.1.[4]" *Read v. Harvey*, 147 Idaho 364, 371 (2009); citing *Fritts,* 144 Idaho at 176. Similarly, it has held where the appellant bears the burden of demonstrating error by the trial court, "its request for this Court to act in the absence of evidence to support their claims was unwarranted under the second element of I.A.R. 11.1." Finally, "this Court has held that 'although an attorney's purpose in filing an appeal may not always appear clear from the record, this Court can infer intent and

[4] I.A.R. 11.1 was subsequently redenominated as I.A.R. 11.2. *See Lattin*, 149 Idaho at 504.

purpose from the attorney's actions and the surrounding circumstances." *Lattin*, 149 Idaho at 504; citing *Fritts,* 144 Idaho at 176.

Throughout this Brief, Respondents have illustrated the deficient manner in which Appellant has presented its issues. This lack of reasoned analysis and specific references to the record was no more apparent than in Appellant's attempt to take issue with the trial court's denial of its motion to continue. Not only did Appellant fail to supply the trial court with a copy of its motion, it similarly failed to preserve the record with a copy same for this Court to consider. Moreover, the Appellant has yet to make any proffer as to the nature of the evidence it was unable to submit in opposition to Respondents' third motion for summary judgment.

Next, Appellant's challenge of the trial court's denial of its motion to continue and award of fees and costs to Respondents were each subject to an abuse of discretion standard. On appeal, Appellant did little more than present strained argument accompanied by an invitation for this Court to reweigh the evidence. Specifically, Appellant devoted minimal effort to directing the court to specific findings in the record and transcript which support his tenuous and conclusory claim that the trial court's findings are clearly erroneous or that the trial court abused its discretion in reaching. When viewed as a whole, there is absolutely no foundation for this appeal.

Further, Appellant's request for an award of fees and costs demonstrates the shallow effort it made at researching the pertinent authority and developing the issues on appeal. Without devoting any effort at analysis, Appellant merely asserts that it is entitled to an award of fees and costs under I.C. §§ 12-120(3) and 12-121.

For these reasons, along with each of the deficiencies in Appellant's presentation noted throughout this Brief, Respondents submit they are entitled to an award of their fees under I.C. § 12-121 and I.A.R. 11.2.

V. CONCLUSION

For the reasons outlined above, Respondents respectfully requests that this Court affirm the judgment of the trial court. Further, Respondents requests that it be awarded its costs and reasonable attorney's fees incurred defending this Appeal.

RESPECFULLY SUBMITTED this 8th day of October, 2013.

LUKINS & ANNIS, P.S.

By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of October, 2013, I caused to be served two (2) copies the foregoing by the method indicated below, and addressed to all counsel of record as follows:

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